

ever questioned. Tr. 305. The affidavit was thus offered not to deny the arrangement with Kay, but rather to confirm Sobel's existence as a separate and distinct entity.

The purpose and context of the affidavit is clear from its very first sentence: "I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr." WTB Ex. No. 43. Sobel testified that he considered the affidavit "an attempt to correct a screw up by the Bureau." Tr. 143. He further explained: "I kind of had to raise my hand and say, 'Yeah, I'm a person here.' The [affidavit] stated in the very first line, 'I am individual, entirely separate.' I am not James Kay. The purpose was to establish to the Bureau that I am not an a/k/a of Mr. Kay. I am a real living person and they screwed up." *Id.* "[T]he Bureau clearly had made a mistake, and at some point in time, we would have to be separated. Assuming that I did not exist, maybe the Bureau's designation would have been correct, but I do exist so it wasn't correct. *This is what the affidavit was all about.* Tr. 155 (emphasis added).

The ALJ attached significance to the fact that Sobel did not, himself, submit the agreement to the Commission until his 1996 response to the Bureau's 308(b) request. But there was no particular occasion for Sobel to do so. To be sure, Sobel did not submit a copy of the agreement along with his affidavit, but neither did he submit the affidavit himself. He merely signed the affidavit. It was filed by Kay in a proceeding to which Sobel was not a party. Sobel neither intended nor expected that the affidavit would serve to conceal his agreement with Kay. Tr. 299-303. Sobel testified as follows:

Q: Don't you think, Mr. Sobel, the Commission would have wanted to know about the Management Agreement at this time?

A: I thought they probably already knew about it. I don't remember —

Tr. 155. Indeed, he thought "Mr. Kay [had] filed it ... along with his motion to enlarge." Tr. 303.²⁵

The ALJ grossly misunderstood and distorted this aspect of the evidence. The ALJ states:

When the Presiding Judge first asked whether Sobel filed the agreement with the Commission when he signed it, Sobel attempted to claim that Kay filed the agreement along with Kay's Motion to enlarge. [Tr. 303] Counsel for Sobel then stipulated that Sobel was incorrect. *Id.* In fact, Sobel did not submit the Management Agreement to the Commission until July 3, 1996, after the Commission specifically asked for it in its letter of inquiry to Sobel. Tr. 313-314.

Initial Decision at ¶ 62. The ALJ makes it sound as if Sobel were caught in a lie, but that is not what transpired at the hearing, nor is it a fair reading of the transcript. The ALJ then questioned Sobel as follows:

JUDGE FRYSIK: When you signed the agreement, did you file it with the Commission?

THE WITNESS: Mr. Kay filed it with the Commission, along with his motion to enlarge. It went to the judge.

²⁵ A copy of the written agreement was in fact produced by Kay less than two months later.

JUDGE FRYSIK: At the time that you signed the agreement, did you file it with the Commission?

THE WITNESS: No. I did not.

Tr. at 303. A moment later, counsel for the Bureau and for Sobel engaged in the following exchange:

MR. SCHAUBLE: Your Honor, we would like to clarify that, to our knowledge, the management agreement was not attached to the motion.

MR. KELLER: I will stipulate that the witness is incorrect. But the witness has already testified, he was not familiar with the motion to enlarge, anyway.

Id. Sobel testified that he believed Kay included the agreement with the January 1995 pleading. Counsel's stipulation that the witness was factually mistaken does not change that it was nonetheless his good faith belief.

When Sobel signed the affidavit, he believed the Commission already had or would soon obtain a copy of the agreement in the course of the Kay proceeding. *Id.* The Commission may take official notice that Kay in fact produced a copy of the management agreement on March 24, 1995. *Kay's Responses to Wireless Telecommunications Bureau's First Request for Documents* in WT Docket No. 94-147, less than two months after he submitted the Sobel affidavit.²⁶ In *Pinelands, Inc.*, 7 FCC Rcd 6058 (1992), the Commission concluded that there was no intention to deceive on where the information the applicant allegedly sought to conceal was already on file in separate ownership reports filed by other licensees, and the failure to discover and report was negligent rather than intentional. The information Sobel allegedly sought to conceal (the agreement) was before the Bureau, not in a separate filing or proceeding, but in the same proceeding in which the allegedly false affidavit was submitted. Sobel was not a party to the proceeding in question, had no affirmative obligation to provide the challenged information, and neither the agreement nor the supporting affidavit were in fact submitted by Sobel. Moreover, Sobel may not fairly be accused even of negligence, much less intentional deceit or concealment, because his reasonable interpretation and understanding of the affidavit is that it was not inconsistent with the agreement.

²⁶ There is reason to question whether the Bureau itself sincerely believed that Sobel had acted with deceptive intent, or even that there was any misstatement of facts. The written agreement, the Sobel affidavit, the Kay pleading with which the Sobel affidavit was submitted, and a supporting affidavit by Kay have all been pending before the Commission and in the Bureau's possession since March of 1995. In all of that time up to the commencement of this proceeding, the Bureau never sought to add misrepresentation or lack of candor issues in the Kay proceeding. When the Bureau presented a designation order for Commission consideration in this proceeding, after supposedly investigating Sobel for an additional year after the deletion of his licenses from the Kay proceeding, it did not include misrepresentation or lack of candor issues against Sobel. After designation of this proceeding, Sobel sought to discover information going to his good faith. When the Bureau objected on relevance grounds, Sobel countered that the requested information was relevant because the license revocation sanction sought by the Bureau could not be imposed solely for the alleged unauthorized transfer of control in the absence of a showing of deceptive intent or other violations or bad faith by Sobel. *Sobel's Response to the Bureau's Objections to Requests for Admission* at 2-3 & n.3 (March 27, 1997). One week later, the Bureau for the first time requested the addition of the candor issue against Sobel on the basis of alleged inconsistencies between two documents it had held in its possession for the past two years. *Wireless Telecommunications Bureau's Motion to Enlarge Issues* (April 3, 1997).

Sobel's reliance on legal counsel also defeats the suggestion that he had any deceptive intent. Although the Commission is reluctant to excuse violations based on the alleged failures of counsel, *see, e.g., Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, 420 n.6 (1986), the Commission is equally reluctant to impute a disqualifying lack of candor where there has been good faith reliance on advice of counsel. *See WEBR, Inc. v. FCC*, 420 F.2d 158, 167-68 (D.C. Cir. 1969) (good faith reliance on counsel is relevant to determining who is acting with candor); *Broadcast Associates of Colorado*, 104 FCC2d 16 (1986) (applicant who improperly certified application on advice of counsel not disqualified); *Video Marketing Network, Inc.*, 10 FCC Rcd 7611 (1995); *Fox Television Stations*. In this case, Sobel did more than rely on advice, legal counsel actually wrote both of the two documents that form the basis of the alleged misrepresentation and lack of candor. B&S drafted the management agreement that Sobel and Kay executed on October 30, 1994 and re-executed on December 30, 1995. B&S also wrote the affidavit that Sobel, at their request, executed on January 24, 1995, less than a month after re-executing the agreement. Sobel signed the affidavit in the belief that the management agreement, if it had not already been provided to the Bureau in WT Docket No. 94-147, would be shortly, and B&S in fact delivered a copy of the agreement to the Bureau on March 24, 1995, only two months after Sobel signed the affidavit. A finding of deceptive intent on Sobel's part would require the fantastic conclusion that his legal counsel knowingly asked him to commit perjury. Sobel's reliance on the advice and actions of counsel can not be squared with the charge that he intended to conceal the agreement by executing the affidavit.

3. The Stanford Letter and the Application Return Notices²⁷

The ALJ faults Sobel for not having disclosed the details of his business relationship with Kay. In a letter dated December 6, 1994, sent by Sobel to Mr. Gary Stanford of the FCC staff in Gettysburg PA. WTB Ex. 46. Sobel was certainly under no such obligation, and it is unreasonable to expect that he would have done so at that time and in that context. The letter sent by Sobel in an attempt to get action on some long-pending applications and finder's preference requests. Sobel had no reason to believe that the Commission thought there was something improper in the terms of his relationship with James Kay. Rather, because of the draft designation order Kay had obtained through FOIA, Sobel knew the Commission erroneously believed he was an alias of James Kay. He wrote to Gary Stanford in an effort to correct the Commission's mistaken belief. To expect that Sobel would, in this context, *sua sponte* spell out each and every detail of his business dealings with Kay is somewhat akin to expecting a parent to explain details of lunar geology to a child who has just announced that the man in the moon likes green cheese.

This Stanford letter on its face contradicts the assertion that Sobel intended or attempted to conceal his relationship with Kay. Sobel states in the letter his belief that action on his applications is being withheld "due to my association with Mr. Kay." He also wrote: "My business and tax registration and resale tax permits go back to 1978 - long before I began conducting any business whatsoever with Mr. Kay." Those statements constitute an admission of, not a failure to disclose, a business affiliation between Sobel and Kay. The letter concluded with the following offer: "Should you need further assistance ... in this matter, please call me at your convenience." Neither Stanford nor anyone else from the Bureau ever responded to Sobel's letter. Instead, the Commission proceeded to adopt and release the Kay designation order, including the erroneous statement regarding Sobel.

The ALJ also points to three letters submitted to the Commission by Sobel in early 1993 in response to application return notices. WTB Ex. Nos. 19, 21, 23. The implication is that the redaction of the billing address (which was that of Lucky's Two-Way Radios, a Kay trade name) from attachments to these letters constituted an improper withholding by Sobel of information from the Commission. But there are a number of problems with this theory. First, the record is clear that Sobel did not mark out the information in question. Tr. 87-98. It was more than likely excised by Kay, but Kay has no specific recollection of doing so. Tr. 335-339. Although Sobel assumes the attachments, as marked, were with the letters at the time he reviewed and signed them,²⁸ he does not have a specific recollection of that fact. In any event, the billing address was not relevant nor material to the matter being addressed in these letters.²⁹ The purpose of the letters was to provide the Commission with evidence that a specified number of users were actually receiving service on the channels in question. The location of the billing address and the identity of the billing agent were immaterial to the matters under consideration by the Commission. Even the Bureau did not deem this information to be of any significance because, as a result of Sobel's letters, it re-accepted, processed, and granted the subject applications without making any inquiry regarding the excised portions of the attachments.³⁰

²⁷ The ALJ's findings and conclusions of misrepresentation or lack of candor based on Sobel's December 6, 1994, letter to Gary Stanford, or the 1993 responses to application return notices are beyond the scope of the issues in the proceeding and must be set aside. *The Telephone Co., Inc.*, 41 RR 2d 611, 616-617 (1977).

²⁸ This is not based on recollection, but rather that fact that Sobel's copies are blacked out. This is consistent with, but does not prove, the theory that the originals were so redacted when sent to the Commission. The Bureau, which has the burden of proof, did not produce the original. Thus, the Bureau has presented no conclusive evidence that (a) the information was in fact blacked out of the originals, or (b) that any such redaction was done by Kay or Sobel.

²⁹ The Bureau could have easily requested the information if it was required for some other purpose.

³⁰ The letters in question were submitted with respect to applications in FCC File Nos. 614563, 614564, and 614566. These applications are not among the pending applications designated in this proceeding. The Commission may take official notice of the fact that these applications were, after receipt of the letters in question, processed and granted by the Bureau.

D. The Sanctions Imposed are Overbroad and Unreasonably Harsh.

The ALJ imposed the ultimate regulatory penalties, namely, a determination that Sobel is unqualified to be a Commission licensee, the denial of all of his pending applications and requests, and revocation of all of his licenses. Even assuming it is determined that Sobel transgressed Commission regulations or policies in some way, the record does not warrant such severe sanctions. Sobel has no record of past misconduct. He is not guilty of intentional misrepresentation or lack of candor. Even if the Sobel-Kay arrangement constitutes an inadvertent unauthorized transfer of control,³¹ disqualification, denial, and revocation are entirely improper sanctions. An unauthorized transfer of control, in and of itself, is not grounds for disqualification unless coupled with an intent to deceive the Commission or other disqualifying conduct.³² Moreover, the scope of the sanctions imposed is overbroad. Any inadvertent transgression by Sobel related entirely and exclusively to his 800 MHz repeaters, a fraction of his total operations, and does not warrant revocation of all his licenses.

IV. CONCLUSION

WHEREFORE, it is respectfully requested that the *Initial Decision* be reversed; that the Commission adopt findings and conclusions based on the record in the proceeding; that all of the issues be resolved in favor of Sobel; and that Sobel's pending applications and filings be processed forthwith.

Respectfully submitted this 12th day of January, 1998,

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³¹ The Commission's usual response to unauthorized transfers is to require them to be undone. *E.g.*, *Ellis Thompson*, 3 FCC Rcd 3962 (Mob. Serv. Div. 1988) (cellular application granted conditioned on removal from an agreement a paragraph potentially conferring control on a third party), *affirmed on recon.*, 4 FCC Rcd 2599 (Com. Car. Bur. 1989), *affirmed on review sub nom. Ellis Thompson Corp.*, 7 FCC Rcd 3932 (1992), *reversed on other grounds sub nom. Telephone and Data Systems, Inc. v. FCC*, 19 F3d 42 (D.C. Cir. 1994); *Petroleum V. Nasby Corp.*, 10 FCC Rcd 6029 (Rev. Bd. 1995), *recon. granted in part*, 10 FCC Rcd 9964 (Rev. Bd. 1995) (renewal and belated approval of an unauthorized transfer of control issued subject to a divestiture condition), *remanded on other grounds*, 11 FCC Rcd 3494 (1996). When a is imposed, it is typically a forfeiture, not license revocation. *E.g.*, *Rasa Communications Corp.*, 11 FCC Rcd 13243 (1996); *Kenneth B. Ulbricht* (DA 96-2193; December 31, 1996); *Galesburg Broadcasting Co.*, 6 FCC Rcd 2210 (1991); *The Hinton Telephone Co.*, 6 FCC Rcd 7002 (1991), *forfeiture reduced*, 7 FCC Rcd 6643 (1992). See also, Forfeiture Policy Statement, 12 FCC Rcd 17087 (1997).

³² See the cases cited in footnote 9, above.

CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for Marc D. Sobel d/b/a Air Wave Communications, hereby certify that on this 12th day of January, 1998, I caused copies of the foregoing *CONSOLIDATED BRIEF AND EXCEPTIONS* to be sent by first class United States mail, postage prepaid, except as otherwise indicated below, to the presiding officer and the parties in WT Docket No. 97-56, as follows:

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